This Recommended Order and Decision was followed by an Order and Decision in the 2nd Quarter of 2004.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
FRED E. SVALDI,	)	
	)	**CHARGE: 1999CN1301**
Complainant,	)	**EEOC:**
	)	**ALS NO: 11098**
	)	
and	)	
KEMPER NATIONAL INSURANCE CO.,	)	

Respondent.

RECOMMENDED ORDER AND DECISION

This matter comes on to be heard pursuant to Respondent's, Kemper National Insurance Co.'s (Kemper) Motion for Summary Decision. Complainant, Fred E. Svaldi, filed a Response, and Respondent filed a Reply. Also, Complainant filed a Motion for Summary Decision. Respondent filed a Response to Complainant's motion and Complainant filed a Reply. This matter is ready for decision.

Statement of the Case

Complainant filed a Charge of Discrimination on December 1, 1998, alleging that Respondent discharged him because of his arrest record in violation of Section 2-103 of the Illinois Human Rights Act (Act). On November 16, 1999, the Illinois Department of Human Rights (Department) filed a complaint on Svaldi's behalf, making the same allegation.

Contentions of the Parties

Respondent states that it terminated Complainant not because he had been arrested, but based upon other facts that indicated that he committed the acts for which he was arrested, which is permitted after the 1995 amendment to 775 ILCS 5/2-103. Respondent states that after learning of Complainant's arrest, it discovered that Svaldi admitted, in a signed confession, that he exposed himself to two individuals, one of whom was a 15-year old girl. The confession also indicated that Svaldi engaged in this behavior due to job stress. Kemper states that it had to terminate Complainant because State and Federal law requires that Respondent maintain a safe environment that is free of sexual harassment.

In his Response, Svaldi argues that Kemper did indeed terminate him because of his arrest record. Kemper was aware of his arrest on February 25, 1998, via a newspaper article that appeared in the Chicago Tribune, yet allowed him to continue his employment for almost four months; Svaldi was terminated on June 22, 1998.

Further, Complainant states that Kemper's investigation – which only consisted of contacting the police – was insufficient and did not provide credible information upon which to base its termination decision. Svaldi argues that the police are inherently biased, so Respondent was obligated to investigate further.

Moreover, Svaldi argues that his behavior was unrelated to his work duties at Kemper, so he should not have been terminated because of his off duty conduct. Further, Svaldi states that Kemper made inconsistent judicial statements as to the reason that Complainant was terminated. Therefore, he argues, this tribunal must conclude that Respondent terminated him because of his arrest record.

Svaldi also argues that Kemper's assertion that it had to terminate him because State and Federal law requires that Respondent maintain a safe environment is faulty because his behavior happened while he was off duty and off premises. Complainant maintains that there is no evidence that he engaged in any hostile behavior toward his coworkers. Finally, Svaldi argues that he was treated less favorably than other similarly situated employees.

Findings of Fact

1. Complainant began working for Respondent on March 16, 1987.

2. On February 25, 1998, Respondent learned that Complainant had been arrested.

3. On February 26, 1998, Kemper's Human Resources Department requested that its Internal Security Division initiate an investigation into Svaldi's arrest.

4. Svaldi was allowed to continue working in his position at Respondent during the investigation.

5. Respondent's Internal Security Division contacted the Mundelein Police Department regarding Complainant's arrest and attended Complainant's court hearings.

6. Sometime in April of 1998, Vincent Inserra, Director of Respondent's Internal Security Division, contacted the arresting officer and learned that Svaldi had confessed to exposing himself to two females, one of whom was 15 years old.

7. On or about June 9, 1998 Respondent decided to terminate Svaldi. Svaldi was away on business and Respondent decided that it would terminate him upon his return.

8. Svaldi was terminated on June 22, 1998.

Discussion

Paragraph 8-106.1 of the Illinois Human Rights Act, 775 ILCS 5/101-1 *et seq*., specifically provides that either party may move, with or without supporting affidavits, for a summary order in its favor. If the pleadings and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a recommended order as a matter of law, the motion must be granted. The Commission has adopted standards used by Illinois courts in considering motions for summary judgment for motions for summary orders, and the Illinois Appellate Court has affirmed this analogy. Cano v. Village of Dolton, 250 Ill.App3d 130, 620 N.E.2d 1200, 189 Ill.Dec. 833 (1st District 1993).

Section 2-103 of the Human Rights Act provides:

> (A) Unless otherwise authorized by law, it is a civil rights violation for any employer, employment agency, or labor organization to inquire into or to use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded under Section 5 of the Criminal Identification Act as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment. . .
>
> **(B) The prohibition against the use of the fact of an arrest contained in this Section shall not be construed to prohibit an employer, employment agency, or labor organization from obtaining or using other information which indicates that a person actually engaged in the conduct for which he or she was arrested.**

(775 ILCS 5/2-103 (1995), emphasis added).

Section 2-103 of the Act was codified in recognition of the fact that just because a person has been arrested, that fact, without more, does not mean that the arrestee has committed the crime for which he or she was arrested. Cook County Police and Corrections Board v. Fair Employment Practices Commission, 59 Ill. App3d 305, 376 N.E. 2d 11, 14 (1st District, 1978). Nor does it mean that the arrestee has shown

disrespect for the law. Id. To establish a violation of Section 2-103, a complainant need only show that the employer used the fact of an arrest as the basis for a decision that adversely impacted him. See, Id.

It should be noted that this section of the Act was amended in 1995. Formerly, Section 2-103 read:

> Unless otherwise authorized by law, **it is a civil rights violation** for any employer, employment agency or labor organization to inquire into or **to use arrest information. . .**

(*775 ILCS 5/2-103 (1995), emphasis added).* "Arrest information" is clearly more expansive than the mere fact of an arrest. Thus, under the pre-1995 version of 2-103, the use of arrest information in an employment decision is a civil rights violation. Under the 1995 version, the use of such information is permissible. Tyrone Johnson v. Champaign County Sheriff's Department, 1997 ILHUM LEXIS 647 (November 24, 1997). Also, while an employer cannot rely solely upon police reports, other information from the police department qualifies as permissible arrest information. Id.

In the case at bar, it is clear that Respondent used the information that Complainant confessed to the crime with which he was charged in making its decision to terminate him. No action was taken against Svaldi when Respondent first learned of his arrest in February 1998. Kemper learned that Complainant confessed in April 1998 and Svaldi was terminated in June 1998. The fact that Svaldi continued to work at Respondent after Kemper learned of his arrest in February 1998 bolsters Respondent's assertion that arrest information (the confession) indicating that he committed the crime with which he was charged, not the mere fact of the arrest, prompted Respondent to terminate Complainant.

Further, even if it is true, as Complainant claims, that Respondent changed its stated reason for terminating Svaldi via inconsistent judicial admissions, those reasons given by Kemper neither violate the Act nor are material facts[1]. The question in this case is whether Kemper terminated Svaldi because of his arrest record. The answer to that question is clearly, no. The facts, to which even Complainant admits, support this conclusion. Kemper took no action against Svaldi when it learned of the arrest. Svaldi was terminated after Kemper learned that he had confessed – a very good indication that Svaldi committed the crime with which he was charged, *(see, Exhibit G attached to Respondent's Motion for Summary Decision)*. Kemper used other information, which indicated that Svaldi actually engaged in the conduct for which he was arrested, not the fact of the arrest or the police report, in making its decision to terminate Complainant. This is allowed under the Act.

Next, Complainant appears to argue that Kemper treated two employees more favorably, who were similarly situated to him. Alex Arroyo was convicted of indecent exposure and was subsequently terminated. Complainant does not indicate that Arroyo confessed to the crime prior to his conviction. Kemper waited until Arroyo was convicted – a good indication that Arroyo committed the crime with which he was charged – before terminating him. In other words, Kemper relied upon other information, which indicated that Arroyo actually engaged in the conduct for which he was arrested, not the fact of Arroyo's arrest, in its decision to terminate him. Arroyo, while similarly situated to Svaldi, was not treated more favorably.

[1] Complainant asserts that Kemper first stated that he performed his duties in a satisfactory manner, flip-flopped and then flip-flopped again, and Kemper stated that his conduct compromised his reputation with clients and that Kemper stated that it feared that Svaldi would expose himself at work and Kemper had a responsibility to maintain a safe environment free of sexual harassment, (Complainant's Response to Kemper's Motion for Summary Decision, at pg. 6-7).

Complainant makes the same argument concerning a Robert Westfall. A coworker of Westfall's complained of sexual harassment and Westfall's supervisor ordered him to cease his actions. The victim complained a second time and Westfall was terminated for disobeying his supervisor's instructions regarding the sexual harassment of a fellow employee. Westfall is not similarly situated to Svaldi. Complainant seems to assert that because Kemper stated that it terminated Svaldi because it had a duty to insure a work environment free of sexual harassment, Westfall is similarly situated to him. However, the complaint in the present case alleges discrimination based upon arrest record, this case is not about sexual harassment. Westfall's situation is inapposite here.

Finally, Complainant also filed a Motion for Summary Decision. However, in light of the decision on Respondent's Motion for Summary Decision, Complainant's Motion for Summary Decision, which contained arguments identical to those presented in Complainant's Response to Respondent's Motion for Summary Decision, is moot. Complainant also includes arguments regarding the admissibility of information contained in affidavits attached to Respondent's Motion for Summary Decision. These matters were previously decided *(see, August 22, 2001 Order)* and require no further discussion here.

Conclusions of Law

On the basis of the controlling precedent, statutory authority, the findings of fact and the discussion, I conclude that no material issues fact exist and that Respondent, Kemper National Insurance Company, is entitled to a judgment as a matter of law.

Recommended Order

For the foregoing reasons, I recommend that Respondent's Motion for Summary Decision be GRANTED, and the complaint be DISMISSED in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

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BY:
WILLIAM H. HALL, IV
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: January 27, 2003